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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1299-1300

SOUTHERN TRANSPORTATION COMPANY, as Owner of the Barge "CUTLER",
Libellant-Appellee,

—against—

M/V "JULIUS H. BARNES", ERIE & ST. LAWRENCE CORPORATION,
Claimant-Appellant,

and

"CALATCO NO. 2" and CANAL LAKES TOWING CORPORATION,
Claimants-Respondents-Impleaded-Appellees.

ERIE & ST. LAWRENCE CORPORATION, Owner of the M/V "JULIUS H. BARNES",
Libellant-Appellant,

—against—

"CALATCO NO. 2" and CANAL LAKES TOWING CORPORATION,
Respondents-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILBUR E. DOW, JR.,
Counsel for Petitioner.

Dow & Symmers,
William G. Symmers,
Of Counsel.

The Court Press, N. Y. C.

INDEX.

PAGE

Petition for Writ of Certiorari 1

A. Summary Statement of the Matter Involved..... 2

1. The Opinions Below 2
2. The Jurisdiction of This Court 2
3. The Statute Involved 2
4. Statement of Facts 2

B. The Appeal Proceedings Below 4

C. The Questions Presented 4

D. The Reasons Relied on for the Allowance of the Writ 7

E. The Accompanying Documents 9

Brief for Petitioner 11

The Jurisdiction of this Court 12

The Facts 12

POINT I—The Circuit Court of Appeals in a *per curiam* opinion has wrongly affirmed a relaxation of several of the most important Rules of the Road at Sea established by International Convention and thereafter firmly adhered to by this Court in every similar case ever brought before it, which, if permitted to stand, can only result in confusion among navigators and seamen generally. Its importance to seamen and Courts of Admiralty throughout the world cannot be overemphasized 12

A. The law is settled that the privileged vessel must maintain her course and speed as long as it is possible for the burdened vessel to avoid collision by righting her helm, in the absence of some distinct indication that the burdened vessel is about to fail in her duty, as this Court has often and firmly held 12

PAGE

B. The Rules of the Road were made for seamen of all nationalities and so arranged as to operate equally well in daylight or in darkness, where the nature of approaching vessels, their nationality, customary home waters, speed, horsepower or maneuverability cannot be known. If we are to inject the element of maneuverability into the Steering and Sailing Rules, the result will be chaotic, not to say incomprehensible, to seamen the world over 24

C. The faults of the "Calateo No. 2" were both grievous and many and clearly account for the collision; under the prevailing rule in this Court there was no ground for divided damages..... 29

LAST POINT—The prayer of the petitioner should be granted 32

Appendix 33

TABLE OF CASES CITED:

Ariadne, The, 80 U. S. 475; 20 L. Ed. 542 .....8, 30

Belden v. *Chase*, 150 U. S. 674 .....5, 6, 7, 8, 13

Binghampton, The, 271 Fed. 69 (1921, C. C. A. 2), 8, 13, 15, 17, 18, 19

Boston Socony, The, 63 F. (2d) 246 (1933, C. C. A. 2), 13, 19, 20, 21

Britannia, The, 153 U. S. 130 .....5, 8, 13

Bronx, The, 250 Fed. 843 (C. C. A. 2) 6, 26

Chamberlain v. *Ward*, 62 U. S. 548, 16 L. Ed. 211..... 8

Chicago, The, 125 Fed. 712, 60 C. C. A. 480 (1903, C. C. A. 2) 8, 13

Commonwealth & Dominion Line, Ltd. v. *The Seaboard Transportation Co.*, first reported in 258 Fed. 707 (1919), and upon rehearing, in 275 Fed. 617 (1921).....14, 15, 16

Delaware, The, 161 U. S. 459, 16 Sup. Ct. 519, 40 L. Ed. 771 (1893) 5, 7, 8, 12, 15, 16, 17

Frederick H., The, 4 F. Supp. 593 (E. D. N. Y. 1933)..26, 27, 31

PAGE

Genesee Chief v. *Fitzhugh*, 53 U. S. 443; 13 L. Ed. 1058... 8

Haida D. C., The, 191 Fed. 623, affirmed 196 Fed. 1005, 115 C. C. A. 376 (1912, C. C. A. 2) 8

Highgate, The, 62 L. I. 841, 6 Asp. Mar. L. Cas. 512 (1890) 8

Hokendauqua, The, 270 Fed. 273 (1919, C. C. A. 2).....13, 15

Holland v. *Penn. R. R. Co.*, 47 Fed. Supp. 173, 1942 AMC 1430 . . ..27, 28

Hygrade No. 20, Inc., The v. *Steamtug Newton, et al.*, 1941 AMC 229 .....6, 25, 26

John I. Brady, The, 131 Fed. 235 (C. C. A. 3).....6, 27

Louisiana, The v. *Fisher*, 62 U. S. 1, 16 L. Ed. 29..... 8

Northfield, The, 154 U. S. 629 .....5, 8, 13

Olympic, The (1915), A. C. 385, 84 L. J. P. 49; 112 L. T. 49; 31 T. L. R. 54; 12 Asp. M. L. C. 580, affirmed in the House of Lords (1913) P. 214 8

Oregon, The, 158 U. S. 186, 15 Sup. Ct. 804; 39 L. Ed. 943 8

Pennsylvania, The v. *Troop*, 86 U. S. 125 ..... 6, 8

Piankatank, The, 87 F. (2d) 806 (1937, C. C. A. 4)...8, 13, 21, 22

Winfield S. Cahill, The, 258 Fed. 318 (C. C. A. 2).....6, 25

OTHER AUTHORITIES CITED:

Act of February 13, 1925, Section 3(a) 2

Act of June 7, 1897, 30 Stat. 101, Title 33 U. S. Code:
Sections 154-231 (Inland Rules of the Road) 2
§204, Art. 19 .....5, 5n, 6, 22, 25, 26, 29, 30, 31, 33
§206, Art. 21 .....5n, 24, 33
§207, Art. 22 .....25, 33
§208, Art. 23 .....25, 33
§221, Art. 29 33

International Rules, 38 U. S. Code, Sections 61-141, 26 Stat. 326 .....2, 32

LaBoyteaux, Rules of the Road at Sea 22, 23, 30

Rules of the Road at Sea 9, 12, 13, 24, 31

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No.

SOUTHERN TRANSPORTATION COMPANY, as Owner of the Barge "CUTLER",
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—against—

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Respondents-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Erie & St. Lawrence Corporation, respectfully shows to this Honorable Court as follows:

A. Summary Statement of the Matter Involved.

Your petitioner, Erie & St. Lawrence Corporation, prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals in the above maritime collision case in which both vessels involved were held at fault.

1. The Opinions Below.

The *per curiam* opinion of the Circuit Court of Appeals is reported in 147 Fed. (2d) 545. The District Court's opinion is reported in 58 Fed. Supp. 864.

2. The Jurisdiction of This Court.

The decree of affirmance below was filed on February 21st, 1945. Jurisdiction of this Court is invoked under Section 3(a) of the Act of February 13, 1925.

3. The Statute Involved.

The statute involved is the Act of June 7, 1897, 30 Stat. 101, Title 33 U. S. Code Sections 154-231, known as the Inland Rules of the Road, the pertinent sections of which, identical with the International Rules, 38 U. S. Code Sections 61-141, 26 Stat. 326, are set forth in Appendix, *infra*, page 33.

4. Statement of Facts.

The material findings of the District Court, affirmed below, may be summarized as follows:

The motor vessel "Julius H. Barnes" (owned by petitioner and herein called the "Barnes"), a twin-screw steel bulk cargo vessel, was proceeding on the night of December 10, 1942, from the East River, New York to Bayonne,

New Jersey. The Tug "Calateo No. 2", with a seagoing barge on her starboard side, was proceeding from Perth Amboy, New Jersey, toward Red Hook Anchorage, New York Bay. Both vessels were displaying proper navigation lights. As they approached each other, the "Barnes" blew a single blast when the tug and tow were about half a mile away, but the tug did not answer. The first single blast of the "Barnes" was intended to indicate to the tug that the "Barnes" would pass on the port side of the tug. The "Barnes" blew a second single blast when the tug and tow were less than ¼ mile away (about 400 yards). The second one-blast of the "Barnes" was a crossing signal and the "Barnes" was then off the starboard bow of the tow. The captain of the "Barnes" then felt that there was danger of a collision, but continued full speed ahead, veering slightly to the right. When the tug answered the second one-blast of the "Barnes" with a danger signal and two, he reversed the engines of the "Barnes" and swung the bow of the "Barnes" to the right. The tug had stopped her engines when she blew the danger signal and two. The captain of the "Barnes" ordered full speed ahead on his starboard engine so as to swing in an arc across the bow of the tow. The tug blew a second danger signal and reversed her engines. The tug did not change her course at all during these maneuvers and her first change in speed was when she stopped her engines and blew the first danger signal.

The District Judge concluded:

> "The tug 'Calateo No. 2' was at fault in not seeing the 'Barnes' sooner than she did; in not answering promptly the first single blast of the 'Barnes', and in not changing her course or speed or giving way to the 'Barnes', the privileged vessel."
>
> "The 'Barnes' was at fault in that she continued to travel at a high rate of speed towards the tow and barge, although the tug had not answered the first

> one-blast signal of the 'Barnes'; in that the 'Barnes' blew no signal to inform the tug that the 'Barnes' did not understand the intention or course of the tug; in that the master of the 'Barnes' when he realized that there was danger of collision, did not immediately reverse his engines and blow a danger signal; in that the speeding 'Barnes' unnecessarily crowded the slow moving tow in attempting to pass on the port side of the tug, although there was plenty of water in which the more maneuverable 'Barnes' could have set her course to pass the tow a greater distance off."

No appeal was taken by the tug from the finding that it was to blame.

B. The Appeal Proceedings Below.

The Court below, composed two-thirds of visiting judges, stated at the argument of the appeal that it would have little time to decide the case because the judges were separating that week, and its *per curiam* opinion summarily disposed of the case with the following comment:

> "It is sufficient for us to say that we approve both what the district judge did and the way he did it, and that on his opinion and for the reasons he gave, we affirm his decrees."

C. The Questions Presented.

The questions here involved are of utmost importance to the regulation of domestic and international waterborne commerce and traffic, and involve a determination of whether the mandates of the heretofore uniformly applied and rigidly respected Rules of the Road at Sea, as understood and practiced by mariners throughout the world, may be disregarded so that responsibility for a collision falling within the fixed category of the applicable

mandates of the Rules may be decided, not by adherence to the Rules, but as if it were a case of "special circumstances" and determined in the light of hindsight. Is the certainty of the Rules to be displaced by the uncertainty and confusion of judicial legislation ignoring the statutory duty of the privileged vessel to maintain her course and speed, and that of the burdened vessel to keep out of the way, when the "vessels are crossing so as to involve risk of collision"?

1. Where the burdened vessel fails to abide by the Starboard Hand Rule is the privileged vessel at fault for maintaining her course and speed?[1]

If, so, every crossing situation becomes a case of "special circumstances" as soon as two vessels approach on crossing courses "so as to involve risk of collision", and the Starboard Hand Rule is discarded for a subjective and confusing test amounting to "every man for himself, and let the Courts determine in each case who, if anyone, acted most prudently in the circumstances". The decisions of this Court in *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771 (1893); *The Britannia*, 153 U. S. 130; *Belden* v. *Chase*, 150 U. S. 674; and *The Northfield*, 154 U. S. 629, are thus overthrown.

2. Is the Starboard Hand Rule (Article 19) no longer mandatory where a burdened vessel is less maneuverable than a privileged vessel?

If so, crossing vessels would be charged with the impossible duty of determining relative maneuverability, as

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[1] *Article 19 of the Rules*: When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other. (33 U. S. Code Section 204.)

Article 21: Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed. (33 U. S. Code Section 206.)

here, where the collision occurred in the dark, something never before required by this Court and consistently rejected by the Circuit Courts of Appeals whenever considered by them, as in *The Bronx*, 250 Fed. 843 (C. C. A. 2); *The Winfield S. Cahill*, 258 Fed. 318 (C. C. A. 2); *The John I. Brady*, 131 Fed. 235 (C. C. A. 3) and *The Hygrade No. 20, Inc.* v. *Steamtug Newton, et al.*, briefly reported in 1941 AMC 229. If the decision of the District Court in the case at bar as affirmed *per curiam* by the Circuit Court of Appeals is allowed to stand, the decisions above referred to are overthrown.

3. Where one vessel is guilty of gross statutory fault (failure to maintain a lookout and to abide by the Starboard Hand Rule), and the other vessel guilty of no statutory fault, and only slight error, if any, in judgment, is it still the settled rule of this Court that the vessel guilty of such gross fault shall be found solely liable?

The District Court found the burdened vessel had no lookout, came right ahead without altering course, in violation of the Starboard Hand Rule and struck the port side of the privileged vessel. The failure to have a lookout and the subsequent neglect to act when required, clearly accounts for the collision. As this Court first held in *The Pennsylvania* v. *Troop*, 86 U. S. 125, and has since always affirmed, a vessel guilty of a statutory violation is not entitled to exoneration or divided damages unless she can show that the violations not only *did* not but *could* not have contributed to the collision. No attempt by counsel for the offending vessel was made to meet that requirement of this Court, long mandatory here, and the District Court declined to apply the test.

This Court held in *Belden* v. *Chase*, 150 U. S. 674, 699, citing *The Pennsylvania, supra*, and in many subsequent cases:

> "• • • And it is the settled rule in this court that when a vessel has committed a positive breach of

statute, she must show not only that probably her fault did not contribute to the disaster, *but that it could not have done so. The Pennsylvania* v. *Troop*, 86 U. S. 19 Wall. 125, 136; *Richelieu & O. Nav. Co.* v. *Boston Marine Ins. Co.*, 136 U. S. 408, 422.

Obedience to the rules is not a fault even if a different course would have prevented the collision, and the necessity must be clear and the emergency sudden and alarming before the act of disobedience can be excused. Masters are bound to obey the rules and entitled to rely on the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules. *The Oregon* v. *Rocca*, 59 U. S. 18 How. 570."

D. The Reasons Relied on for the Allowance of the Writ.

It is respectfully submitted that this Court should take up this case on certiorari and set aside the *per curiam* opinion of the Circuit Court of Appeals, which affirms the decree of the District Court which divided damages between the two vessels, and hold the respondent solely liable, on the following grounds:

1. This case involves two vessels, one of which, the "Calateo No. 2", the District Court found had no lookout and as the burdened vessel, violated the Starbord Hand Rule. The other vessel, the "Julius H. Barnes", for brevity called "Barnes", the District Court found to be the privileged vessel but because she was more maneuverable that she should have relinquished her privilege and altered her course and speed, both contrary to the mandate of the statute. As the collision occurred at night and respective maneuverability is purely hindsight, for which the statute makes no provision, such a rule is a complete innovation upon the Rules and contrary to the established decisions of this Court and in direct conflict with such landmark cases as *The Delaware*, 161 U. S. 459, 16

Sup. Ct. 516, 40 L. Ed. 771 (1893); *The Britannia*, 153 U. S. 130; *The Northfield*, 154 U. S. 629; *Belden* v. *Chase*, 150 U. S. 674; and in the English Courts of Admiralty, *The Highgate*, 62 L. T. 841, 6 Asp. Mar. L. Cas. 512 (1890); *The Olympic*, (1915) A. C. 385, 84 L. J. P. 49; 112 L. T. 49; 31 T. L. R. 54; 12 Asp. M. L. C. 580, affirmed in the House of Lords (1913) P. 214.

It is also in direct conflict with the decisions of the Circuit Courts of Appeal in the following cases, among others; *The Binghampton*, 271 Fed. 69 (1921, C. C. A. 2); *The Chicago*, 125 Fed. 712, 60 C. C. A. 480 (1903, C. C. A. 2); *The Haida D. C.*, 191 Fed. 623, affirmed 196 Fed. 1005, 115 C. C. A. 376 (1912, C. C. A. 2); and *The Piankatank*, 87 F. (2d) 806 (1937, C. C. A. 4).

2. The Circuit Court of Appeals has wrongly affirmed a decision of the District Court which detracts from the necessity of maintaining a lookout at night, even though such failure resulted in the inability of the burdened vessel to see the privileged vessel in time to take the positive action required by the statute and was a direct cause of the collision. This is in direct conflict with the decisions of this Court in *The Ariadne*, 80 U. S. 475; 20 L. Ed. 542; *The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804; 39 L. Ed. 943; and numerous subsequent decisions of this Court and the Circuit Court of Appeals.

3. The Circuit Court of Appeals has wrongly affirmed a decision of the District Court on an important question of the laws of evidence, presumption and burden of proof, all contrary to well recognized principles of law and particularly to those stated by this Court to be its settled rule in *The Pennsylvania* v. *Troop*, 86 U. S. 125, 136; *The Ariadne*, 80 U. S. 475, 20 L. Ed. 542; *The Louisiana* v. *Fisher*, 62 U. S. 1, 16 L. Ed. 29; *Chamberlain* v. *Ward*, 62 U. S. 548, 16 L. Ed. 211; and *Genesee Chief* v. *Fitzhugh*, 53 U. S. 443; 13 L. Ed. 1058.

4. All the questions presented herein are of the greatest importance to navigators, seamen and courts of admiralty throughout the world. The Rules of the Road at Sea were established by International Convention and made the law of the flag of every maritime nation throughout the world. They thus constitute the most evenly adjudicated body of international law in existence and should not be varied without the express consent of this Court with full knowledge of the international importance of what it is doing.

E. The Accompanying Documents.

A certified copy of the transcript of the record of the District Court and Circuit Court of Appeals is presented herewith.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a day to be designated for its review and determination, a full and complete transcript of all proceedings in said Circuit Court of Appeals in the cases entitled in that Court: Southern Transportation Company, as Owner of the Barge "Cutler", Libellant-Appellee, against M/V "Julius H. Barnes", Erie & St. Lawrence Corporation, Claimant-Appellant, and Tug "Calateo No. 2" and Canal Lakes Towing Corporation, Claimants-Respondents-Impleaded-Appellees; and Erie & St. Lawrence Corporation, Owner of the M/V "Julius H. Barnes", Libellant-Appellant, against Tug "Calateo No. 2" and Canal Lakes Towing Corporation, Respondents-Appellees, Nos. 210-211, which cases were tried together; that the decision of the said Circuit Court of Appeals rendered on January 22, 1945, be reversed and the decree of the District Court, dividing

damages between the two vessels, be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as may be just.

And your petitioner will ever pray, etc.

Dated, New York, May 19, 1945.

ERIE & ST. LAWRENCE CORPORATION,
Petitioner.

By WILBUR E. DOW, JR.,
Counsel for Petitioner.

IN THE

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Libellant-Appellant,

—against—

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Respondents-Appellees.

BRIEF FOR PETITIONER.

The Opinions Below.

The opinion of the District Court is officially reported in 58 Fed. Supp. 864. The opinion, findings of fact and conclusions of law are printed in the Record (R. 300-323).

The *per curiam* opinion of the Circuit Court of Appeals (Argued January 15, 1945, Decided January 22, 1945) is officially reported in 141 F. (2d) 545 and printed in the Record (R. 341).

The Jurisdiction of This Court.

The jurisdiction is stated in the petition and will not be repeated here.

The Facts.

The facts are also stated in the petition and will not be repeated here.

POINT I.

The Circuit Court of Appeals in a *per curiam* opinion has wrongly affirmed a relaxation of several of the most important Rules of the Road at Sea established by International Convention and thereafter firmly adhered to by this Court in every similar case ever brought before it, which, if permitted to stand, can only result in confusion among navigators and seamen generally. Its importance to seamen and Courts of Admiralty throughout the world cannot be overemphasized.

A.

The law is settled that the privileged vessel must maintain her course and speed as long as it is possible for the burdened vessel to avoid collision by righting her helm, in the absence of some distinct indication that the burdened vessel is about to fail in her duty, as this Court has often and firmly held.

The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771 (1893), Brown, *J.*;

The Britannia, 153 U. S. 130;
Belden v. *Chase*, 150 U. S. 674;
The Northfield, 154 U. S. 629;

and in such well-known decisions in the Circuit Court of Appeals as,

The Binghampton, 271 Fed. 69 (1921, C. C. A. 2);
The Hokendauqua, 270 Fed. 273 (1919, C. C. A. 2);
The Chicago, 125 Fed. 712 (1903, C. C. A. 2);
The Boston Socony, 63 F. (2d) 246 (1933, C. C. A. 2);
The Piankatank, 87 F. (2d) 806 (1937, C. C. A. 4).

If this fundamental and perhaps most important rule of the Rules of the Road at Sea is to be so drastically altered, then this Court and no other should pass upon the change.

The District Court found that after the "Barnes" had blown her first one-blast signal, at a distance of half a mile, and that signal remained unanswered, *the "Barnes" should then have altered her course and speed* although there was no danger of collision at that time (R. 311). The utter inability of the District Court to appreciate the impracticability of this suggestion, without a thought as to whether or not it was good seamanship, is found in the opinion (R. 316) in the further suggestion that when the "Barnes" first started to cross the bay and saw the tug and tow on her port bow, over a mile away, that she could have "slowed down so as to pass around the tow", even though she was the *privileged* vessel and *required* to maintain her course and speed. What a chaotic situation would exist in our crowded harbors, particularly at night, as in the case at bar, if all vessels were required, a mile or more in advance of meeting, to judge the comparative speed and maneuverability of each other, and that if the master of one vessel believed that his ship was more maneuverable than the approaching vessel, he should then circle around or slow down to avoid any possibility of crossing ahead of the other, even though in his original situation *he was the privileged vessel and required to*

maintain his course and speed! What the result would be if the masters of both vessels came to a similar conclusion, one can only guess.

Aside from the utter ridiculousness of the situation that would result if masters and pilots were to attempt to follow the procedure prescribed by the District Court for meeting and crossing vessels, it would be impossible to determine in advance the size or horsepower of the other vessels, the size of the tow, if any, whether the other vessel or her tow was loaded or light, and whether or not the engines of the approaching vessel were functioning at their maximum capacity, even if their horsepower were known.

It was with good reason that the delegates to the International Convention, which formulated the Rules many years ago, strictly refrained from any mention of maneuverability, something no seaman alive could judge in advance, particularly at night, as in the case at bar.

There are some remarkable parallels between the case at bar and *Commonwealth & Dominion Line, Ltd.* v. *The Seaboard Transportation Co.*, first reported in 258 Fed. 707 (1919), and upon rehearing, in 275 Fed. 617 (1921). While navigating in Vineyard Sound, the steamer "Port Hunter" observed a tug with a long tow on her port side showing the steamer a green light. The "Port Hunter" held her course and speed until shortly before the collision, when, in extremis, she maneuvered in an attempt to avoid collision or soften the blow. At the conclusion of the trial, the Court held the collision to be due to the fault of both vessels, the tug for being on the wrong side of the channel and approaching the port side of the steamer and persisting in such a course after seeing the steamer and without warning her, and the steamer being at fault for proceeding at full speed although uncertain as to the course of the tug. At the rehearing the following pertinent cases were called to the attention of the Court.

The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771 (1893), Brown, *J.*:
The Binghampton, 271 Fed. 69 (1921, C. C. A. 2);
The Hokendauqua, 270 Fed. 273 (1920, C. C. A. 2).

Upon consideration of these cases, the Court found that its finding that the "Port Hunter" was at fault could not be sustained, the decree theretofore entered to be vacated, and that there must be a new decree adjudging the "Covington" solely at fault. The Court said, on page 619:

> "'The cases of *The Britannia*, 153 U. S. 130, and *The Northfield*, 154 U. S. 629, must be regarded * * * as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty. * * * In the case under consideration there was really nothing to apprise the tug that the "Delaware" would not port and go under her stern, until the collision became inevitable.' (Old style Helm Orders.)

The rule thus laid down has been frequently applied to situations similar to that presented in the case at bar. See *The Binghampton*, 271 Fed. 69 (C. C. A. 2); *The Hokendauqua* (D. C.), 270 Fed. 270, 272. Moreover, the tug's fault was so gross, and the steamer's fault—if she were at fault—so slight in comparison, that I think the latter should be given the benefit of the principle (applied in *The Hokendauqua, supra*) that, where one vessel is grossly at fault and the fault of the other is doubtful, and at most slight:

> 'It is not necessary, and indeed is not permitted, to the court to search for minute possible faults on the part of one vessel, when the great and

> fundamental faults are plainly to be laid at the door of the other. Hough, *J.*, in *The Hokendauqua, supra.'*
>
> As soon as the tug's green light was made out and her two blasts heard on the steamer, the situation was recognized as a critical emergency and a case of special circumstances under the rules. It is wholly problematical how she would have come out if she had been differently handled in it. Considering the wide latitude of action allowed under such circumstances, it cannot be said that her officers were negligent."

The Delaware, as decided by this Court, is generally considered as settled law on the question of the Starboard Hand Rule. Mr. J. Parker Kirlin ably argued the case for the burdened vessel, and Brown, *J.*, took up many points which might be argued in favor of the "Calateo No. 2", in the case at bar, but firmly held her solely at fault. What was said there is most pertinent here. In *The Delaware*, it was the tug that was the privileged vessel and an English tanker, only a little larger than the "Barnes", in ballast only, which was the burdened vessel. Both ships were in sight of each other from the time they were a mile or more apart and remained in sight until the collision. The privileged vessel blew a one-blast signal concerning which the Court said, on page 467:

> "* * * it means, when a single blast is given by the preferred steamer, nothing more than that she intends to comply with her legal obligation to keep her course, and throw upon the other steamer the duty of avoiding her. * * * If they were so construed as to require the preferred vessel to port after having blown a blast of her whistle, it would involve a violation of Article 23 (now Article 21), which requires her to keep her course. * * * *Certainly the rules should not be construed to require the steamer giving the*

signal to violate a plain statutory rule of navigation." (Italics ours.)

and on page 469:

"The cases of *The Britannia* v. *Cleugh* (*The 'Britannia'*), 153 U. S. 130, and *Hutchinson* v. *The Northfield*, 154 U. S. 629, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility, or even on the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent. *Belden* v. *Chase*, 150 U. S. 674; *The Highgate*, 62 L. T. 841, 6 Asp. War. L. Cas. 512.

In the case under consideration there was really nothing to apprise the tug that the 'Delaware' would not port and go under her stern, until the collision became inevitable. The vessels were in plain sight of each other. * * * In any event, there is too much doubt about the fault of the 'Talisman' to justify us in apportioning the damages."

The language of the Court, cited above, might well be used in the case at bar.

The Binghampton, 271 Fed. 69 (1921), is also singularly like the case at bar. There was plenty of room, as the collision occurred in the open sea off Barnegat. The "Binghampton" was the privileged vessel with the

"Sagua", the burdened vessel, approaching her at right angles, the "Sagua" off the port bow of the "Binghampton". The "Sagua's" engines were going full ahead down to the moment of collision, while the "Binghampton's" engines were put full astern one minute before, although she still had her full way upon her. The "Binghampton" did not get across the bow of the "Sagua" but struck her amidships on her starboard side. The lower Court held that the "Sagua", being the burdened vessel, failed to keep out of the "Binghampton's" way and held the "Binghampton" at fault because "she stubbornly held her course into collision". Damages were divided. On appeal to the Second Circuit, the Court there held the "Sagua" to be solely to blame. The Court there said, on page 72:

> "This is no more than the rule of *The Delaware*, 161 U. S. 4, 16 Sup. Ct. 516, 40 L. Ed. 771, enforced in this court in *The Chicago*, 125 Fed. 712, 60 C. C. A. 480. It may be pointed out that the 'Chicago', like the 'Sagua', blew a two-whistle signal when to do it was almost criminal. This signal was not heard by the 'City of Augusta' (like the 'Binghampton'), but nevertheless it was at that moment that the 'City of Augusta' reversed her engines. It was in such a case (so singularly like the one at bar) that (quoting from the *Delaware*) we held that the privileged—
>
> > 'steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty.'
>
> In the same opinion we sufficiently differentiated the Supreme Court decisions relied upon or referred to by the 'Sagua', viz.: *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126, and the *Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751. See also *The Cygnus*, 142 Fed. 85, 73 C. C. A. 309.

Thus the question must always become one of fact, and as has been pointed out (*The Haida D. C.*, 191 Fed. 623, affirmed 196 Fed. 1005, 115 C. C. A. 376):

> 'It must always be a close question when the time comes at which the burdened vessel can by no possibility do her duty, and *that time is doubly hard for the privileged vessel to find, for she has no right to change her course and speed until then.*' (Italics ours.)
>
> * * * *
>
> We find it shown by a fair preponderance of evidence that the 'Sagua' could have obeyed the rule until she blew those two whistles. But, further, the 'Sagua' is affected by that other rule established by the same cases, viz. when her own fault is so gross and so plainly shown as it is here, it is incumbent upon her to prove affirmatively and conclusively the fault of the other vessel."

At this point we should like to refer to Captain Atkinson's testimony on page 190:

> "Q. Why did you let yourself get so close to this tow? A. After blowing the one I did not think it was advisable to cross."
> (Atkinson—re-direct, R. 195-196)

Re-cross examination by Mr. Heckman:

> "Q. You said in answer to one of the Court's questions that after your one-whistle signal you did not consider it proper to cross your signals; will you tell us what you meant by that? A. Well, by what is known as crossed signals, blowing one designating my course was intended to starboard or to pass port side to port side of each vessel and then going the other way. In other words, blowing one whistle intending starboard and going port instead."

The relative positions of the "Barnes" and the "Calatco No. 2" at the time the "Barnes" blew her first and second one-blast signals is quite immaterial in view of *The Boston*

Socony, 63 F. (2d) 246 (C. C. A. 2d), 1933, which, with *The Delaware*, is perhaps the most oft quoted case on the subject. The "Boston Socony", a tanker in ballast, left her berth in the East River and proceeded across the Channel to round the Belmont Island bell buoy, when she was approached from her port side by the Tug "P. R. R. No. 11", with two carfloats, one strapped on each side of her. The "Socony" held her course and speed until shortly before the collision, when she put her engines full speed astern. It was contended for the tug that (1) the vessel could easily have taken a different course to the left of the tug which would have avoided a crossing situation, as suggested by the Court in the case at bar, and (2) that she failed to blow a one-blast signal. The Court held, on page 247, that:

> "* * * *There is no reason why she should have gone down stream and then ported across. The straight course was shorter and the ebb tide was favoring;* she would naturally get into its strength at once. Heading for the buoy would put her course diagonally across the Channel and *expose her red light to the tug 'No. 11'.*" (Italics ours.)

The Court also said on the same page:

> *"Once it is established that the 'Socony' made straight for the buoy, it is clear that the starboard hand rule applied. She was on a steady course, for she was obviously crossing the channel, as she had the right to do. The Dixie*, 57 F. (2d) 184 (C. C. A. 2); *The Hoboken*, 59 F. (2d) 993, (C. C. A. 2); *The Breakwater* v. *New York, L. E. & W. R. Co.*, 155 U. S. 263, 15 S. Ct. 99, 39 L. Ed. 139. That she intended to turn at the buoy is wholly immaterial; it cannot be successfully maintained that she was merely maneuvering while she was holding a steady heading over the half-mile distance between her pier and the buoy. The 'No. 11' was also on a steady course. * * *" (Italics ours.)

As to the second point, the Court said, on page 248:

> "It is further urged that the 'Socony' should have sounded a passing signal to the 'No. 11'. Being the privileged vessel, she was under no such duty. *The Hoboken*, 59 F. (2d) 993, 995 (C. C. A. 2). Rule 3 of the Supervising Inspectors Rules is relied upon as imposing a duty to signal; but in our opinion that rule cannot be construed as applying to vessels on crossing courses. Whether it would be valid if it were so construed, we need not say. Compare *The Fulton*, 54 F. (2d) 467 (C. C. A. 2)."

The Court also said:

> "There remains the question whether the 'Socony' was properly excused from fault. It is urged that she should have stopped sooner. The privileged vessel is always in a difficult situation. *The rule is that she must keep her course and speed until it becomes apparent that the burdened vessel cannot alone avoid the collision.* 33 USCA § 206; *The Delaware*, 161 U. S. 459, 16 S. Ct. 516, 40 L. Ed. 771; *Wilson* v. *Pacific S. S. Co.*, 276 U. S. 454, 462; 48 S. Ct. 369, 72 L. Ed. 651. It is impossible to know exactly when it became apparent that the 'No. 11' could not, or would not, port or stop. We do not think it was proved that that time had come before the master of the 'Socony' acted" (Old Style Helm Orders). (Italics ours.)

The above quotations have since been cited by many courts as the settled law on the points involved, and makes it immaterial how far apart the "Barnes" and "Calatco" were when the one whistle signals were blown,—the "Barnes" was never *required* to blow them, but alert masters do.

In *The Piankatank*, 87 F. (2d) 806 (1937, C. C. A. 4), a case which involved the application of the Starboard Hand Rule, the court there said, on page 810:

> "Where two courses are open to a vessel, and particularly to the privileged vessel, one to follow the

prescribed rules and the other to depart from them, *the duty is imperative to observe the rules, and to assume that an approaching vessel will do likewise,* until after the danger has become so manifest as to show that there is no proper choice of judgment other than that of departing from the rules. *Any other course would lead to confusion and be a most prolific source of accident. Indeed the rule is so imperative that it does not give a navigating officer any general latitude as to obeying the rules, and permits a departure only when necessary to avoid immediate, and not remote or problematical, danger, and then only to the extent* required to accomplish that object. LaBoyteaux, *supra*, p. 172. Furthermore, *a departure from the rules would place upon the privileged vessel the burden of proving that in doing so it came within the protection of the article.*" (Italics ours.)

In LaBoyteaux, Rules of the Road at Sea, generally recognized as the best work on the subject, this authority, on page 143, treats the duties of the burdened vessel under the Starboard Hand Rule:

"On the theory that the attempt of two approaching vessels to avoid each other by both maneuvering at the same time will work confusion and possibly result in collision, the rules prescribe with exactness the duties of one vessel in certain situations, so that, having knowledge of her movements, the other may with confidence take such steps as are necessary to avert threatened collision.

Articles 17, 19, 20, 24 and 26 define the vessels upon which, and the situations from which, devolve the duty of keeping out of the way, and Article 21 imposes upon the other vessel the *positive obligation* of holding her course and speed.

With knowledge that the privileged vessel is required to hold her course and speed, the burdened vessel is free to maneuver as those in charge of her navigation deem safest. No instructions are given as to how the

burdened vessel shall keep out of the way, except that, under Article 23, a steamer shall, if necessary, slacken her speed or stop or reverse. One restriction only is imposed upon her, namely, that she shall not cross ahead of the holding-on vessel unless that maneuver presents the only means of avoiding collision or other impending danger (Art. 22). *Save for the foregoing, the method by which the keeping out of the way shall be accomplished is left entirely to the judgment and good seamanship of those in charge of the navigation of the burdened vessel, who are held strictly responsible for the result.* A failure will not be excused unless the steps taken were amply sufficient and would have been successful but for an improper act (change of course or speed) by the holding-on vessel." (Italics ours.)

and on page 146:

"Any undue delay on the part of the burdened vessel in taking action, or in communicating her intentions to the holding-on vessel, is not only unfair to the latter (which may be in the uncomfortable and anxious position of not knowing whether she has been seen or whether the giving way vessel is going to perform her duty of keeping out of the way), but is a violation of the spirit of the rules, for which the burdened vessel will be held responsible if collision ensue.

The Carroll, 8 Wall. 302, 306.

'The safeguards against danger, in order to be effectual, must be seasonably employed, and in this case they were not used until the danger was threatening.'

The burdened vessel was held at fault for failure to keep out of the way, for attempting to cross ahead, or for failure to slacken speed, stop or reverse, in the following cases:

The Delaware, 161 U. S. 459; *The Britannia*, 153 U. S. 130; *The Republic*, 102 Fed. 997; *The Straits*

of Dover, 120 Fed. 900; *The Chicago*, 125 Fed. 712; *The Cygnus*, 142 Fed. 85; *The Pocomoke*, 150 Fed. 193; *The Umbria*, 153 Fed. 851; *The John H. Starin*, 162 Fed. 146; *The Deveaux Powell*, 165 Fed. 634; *The Montauk*, 180 Fed. 697; *The Thielbek*, 241 Fed. 209."

The point is best summed up in the answer of the master of the "Barnes" in reply to a question of the Court (R. 190):

> "Q. Why did you let yourself get so close to this tow? A. After blowing the one I did not think it was advisable to cross."

and on page 195, re-cross:

> "Q. You said in answer to one of the Court's questions that after your one-whistle signal you did not consider it proper to cross your signals; will you tell us what you meant by that? A. Well, by what is known as crossed signals, blowing one designating my course was intended to starboard or to pass port side to port side of each vessel and then going the other way. In other words, blowing one whistle intending starboard and going port instead."

B.

The Rules of the Road were made for seamen of all nationalities and so arranged as to operate equally well in daylight or in darkness, where the nature of approaching vessels, their nationality, customary home waters, speed, horsepower or maneuverability cannot be known. If we are to inject the element of maneuverability into the Steering and Sailing Rules, the result will be chaotic, not to say incomprehensible, to seamen the world over.

The "Barnes" was the privileged vessel (Findings of Fact No. 15) but obligated by Article 21 to maintain her

course and speed. The "Calatco" was the burdened vessel, obligated under Article 19 to keep out of the way of the "Barnes," required by Article 22 to avoid crossing ahead of the "Barnes," and under Article 23 required to slacken her speed, stop or reverse in order to comply with the foregoing rules.

These are the relevant Inland Rules (following the International Rules) under which both vessels were operating at the time. The question of "maneuverability", here raised for the first time by the District Court, is completely unsound.

It is obvious that the District Court did not appreciate the magnitude of the imponderables involved in a question of maneuverability, something that no seaman could possibly know when it was time for him to act, and constitutes no sound ground to divide damages, rewarding a violator of the Rules and penalizing a careful and prudent master.

In *The Winfield S. Cahill*, 258 Fed. 318 (1919, C. C. A. 2), the "Seguaranca" was the privileged vessel with the tug "Hedges", with 13 barges in tow approaching her from the steamer's port side on a crossing course. Caught in the current, the tug was untable to control her tow but this was unknown to the steamer. The Court there held the tug to be solely at fault as the steamer was not required to anticipate that a tug, even with a tow of that magnitude, did not have sufficient power to control it, as long as the privileged vessel, once its helplessness was known to those in charge of her, did what she could to prevent it.

In *The Hygrade No. 20, Inc.* v. *Steamtug Newton, et al.*, briefly reported in 1941 AMC 229, the tug "Chemung" with a hawser tow was the burdened vessel, and in a crossing situation where she had the tug "Newton" on her starboard hand, attempted to cross the bow of the "New-

ton" which was obviously more maneuverable. The Court there said, on page 230:

> "Even if the 'Chemung', with a hawser tow, was entitled to any privilege, she should have, if she intended to cross the 'Newton's' bow, sounded a two-whistle signal. The 'Chemung', however, did not sound any passing signals, nor did she even sound an alarm, but continued right on down bringing her tow into collision with the tow of the 'Newton'.
>
> The 'Chemung' did nothing to prevent the collision until too late, when she attempted to snap the stern of the 'Hygrade No. 20' out and avoid collision. The fault of the 'Chemung' is plain and I see no reason to be assiduous in an effort to find fault on the part of the 'Newton'."

In *The Bronx*, 250 Fed. 843 (1918, C. C. A. 2), a tug, with a heavy barge alongside, on a crossing course with a highly maneuverable ferry, where the ferry was the privileged vessel, was held solely at fault for failure to observe the Starboard Hand Rule.

In *The Frederick H.*, 4 F. Supp. 593 (E. D. N. Y. 1933), a tug with a hawser tow 5,500 feet long was held to be solely at fault in a collision with a schooner on the high seas. It is hard to conceive of anything more unmaneuverable than a tow over a mile long, composed of a tug and four ocean-going barges. The court there held that while the schooner was a privileged vessel on a crossing course, she was nevertheless bound to keep her course and speed until it was apparent that the burdened tug could not avoid collision by anything which she herself could do. The Court there said, on page 596:

> "The situation of the 'Frederick H.' as the privileged vessel was a hard one, as she was bound to keep her course and speed until it became apparent that the burdened vessel could not alone avoid the collision. *The Boston Socony* (C. C. A.), 63 F. (2d) 246."

and on page 597:

> *"The faults of the tug 'Catawissa', the burdened vessel, are so glaring and grave, and so clearly adequate in and of themselves, to account for the collision, that this court should not be assiduous to find fault on the part of the schooner. The Socony No. 19* (C. C. A.), 29 F. (2d) 20; *The Lafayette, supra*; *The Chicago* (C. C. A.), 125 F. 712, 716; *The Transfer No. 8* (C. C. A.), 96 F. 253." (Italics ours.)

In *The John I. Brady*, 131 Fed. 235 (1904, C. C. A. 3), the Court held that a privileged vessel on crossing courses is not bound to anticipate the negligent maneuvers of a heavily laden tug with four barges, though obviously more easily handled than the tug and her tow. In this case the Court divided the damages because the steamer had no lookout and did not blow proper passing signals.

A recent well-considered case, *Holland* v. *Penn. R. R. Co.*, 47 Fed. Supp. 173, 1942 AMC 1430, is recommended for the court's scrutiny. In daylight, a small freighter, the "Big Chief", of less than 300 tons and 146 feet in length, was the privileged vessel bound up the Hudson River when she encountered the tug "Trenton" on her port side with a big loaded carfloat strapped to her starboard side, much as the "Calatco No. 2" and barge "Cutler". The tug and tow had little or no way upon them and were drifting down the tide. The master of the privileged vessel made no change in his course or speed until 250 feet from the carfloat, at which time he put his engines full astern and his wheel hard right. The court held the tug "Trenton" solely at fault in spite of the fact, as was pointed out by counsel for the tug, that the privileged vessel was very considerably the more maneuverable of the two. In conclusion, the Court said, at page 175:

> "There is the possibility that dual fault might be found in this case for the reason that the master of the 'Big Chief' permitted his vessel, which was the

more maneuverable of the two, to shift her course two points (22½°) to starboard just prior to the collision, when, if he had made sharply to port there is the possibility that he might have crossed under the stern of the carfloat. I recognize that the 'Trenton's' fault does not excuse the 'Big Chief' from adopting every proper precaution required by the special circumstances of the case to prevent a collision. Nevertheless, I believe this was a situation such as was commented on by Judge Kalodner in *The Gulfstar*, 1940 A. M. C. 900, at 911, 42 F. Supp. 440, at 447, where he said:

> 'Moreover, where the 'Gulfstar' (The 'Trenton'-'Calatco No. 2') the burdened vessel, had placed the 'Sun' (The 'Big Chief'-'Barnes') in danger by bad navigation, the navigators of the privileged vessel are not held to the exercise of perfect and impeccable conduct in their navigation; they are only held to the exercise of their best judgment, which may not necessarily turn out to have been the best course to pursue; and the failure to adopt the best policy in an absolute sense, under the circumstances such as these, when faced by danger, does not charge them with negligence in navigation; *Wilson* v. *Pacific Mail S. S. Co.* ('Newport'-'Svea') 276 U. S. 454, 1928 A. M. C. 740, 48 Sup. Ct. 369, 72 L. Ed. 651.'"

The facts in this case, while almost identical with the case at bar, were much more favorable to the "Trenton" than to the "Calatco No. 2". The "Trenton" had a lookout while the "Calatco No. 2" did not; the "Trenton" collision occurred in daylight when some opportunity was afforded each vessel to size up the maneuverability of the other, but in the case at bar it was dark and the lights gave no indication of maneuverability; the "Trenton" righted her helm, though tardily, the "Calatco No. 2" never did, coming straight ahead.

When two vessels approach each other to the point where collision is imminent, maneuverability must then,

of course, where it is determinable, be taken into consideration where the collision cannot be avoided by the action of the giving away vessel alone. "* * * When the tug answered the second one-blast of the 'Barnes' with a danger signal and two, he (the Captain of the 'Barnes') reversed the engines of the 'Barnes' and swung the bow of the 'Barnes' to the right * * *" (Findings of Fact No. 9). If maneuverability ever entered into this situation, it came in at that point. In spite of the prompt and seamanlike manner in which the Master of the "Barnes" acted, he still could not avoid collision as the "Calatco No. 2" never altered her helm from straight ahead, although the slightest change, in response to the Rule, would have been sufficient to avoid the collision.

Had the "Barnes" hauled sharply to her right, as the District Court has said she should have because she turned out to be more maneuverable than the tug, she would herself have run afoul of the Starboard Hand Rule requiring her, as the privileged vessel, to hold her course and speed. Had collision then occurred, she would certainly have been equally to blame. (See the cases collected under Point I, A herein.)

The question of maneuverability did not enter into the situation in the case at bar until collision could not be avoided by the burdened vessel alone. The Master of the "Barnes" then promptly took the steps best calculated to avoid it or minimize its effect.

C.

The faults of the "Calatco No. 2" were both grievous and many and clearly account for the collision; under the prevailing rule in this Court there was no ground for divided damages.

That all moving vessels must maintain a careful and efficient lookout is an elementary rule of navigation and

good seamanship. In *The Ariadne*, 80 U. S. 475, 479; 20 L. Ed. 542, 543, this Court said:

> "• • • It is the duty of all courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty, and the effect of nonperformance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary. *The Louisiana* v. *Fisher*, 21 How. 1, 16 L. ed. 29; *Chamberlain* v. *Ward*, 21 How. 549, 16 L. Ed. 211; *Genesee Chief* v. *Fitzhugh*, 12 How. 443."

In innumerable subsequent cases this Court has never relaxed the prime importance so early placed upon this mandate of the Rules.

The Rules of the Road at Sea, LaBoyteaux, page 220:

> "'No deviation from this statement has been made by the supreme court in later cases (*The Oregon*, 158 U. S. 186, 193, 39 L. Ed. 943) and it is therefore as binding today as when first made.'
>
> *Wilder's S. S. Co. et al.* v. *Low et al.*, 112 Fed. 161, 172."

The second fault found by the District Court, the failure of the "Calateo" to promptly answer the first one-blast signal of the "Barnes", is simply a *result* of her failure to have a lookout and a *part* of her third fault, failure to abide by the Starboard Hand Rule.

The third fault of the "Calateo" as found by the District Court was her failure to change her course or speed or give way to the "Barnes", an outright violation of the Starboard Hand Rule. The cases collected under Point I, A concerning this rule may be applied against the "Calateo No. 2" for her failure to obey the Rule as well as to the "Barnes" duty of holding on.

The District Court thus found that everything the "Calatco" did was wrong and that everything she should have done she failed to do. In view of these grave faults and the manner in which they so clearly account for the collision, this Court is warranted in applying the rule so clearly expressed in *The Frederick H., supra,* and many subsequent cases.

> "The faults of the tug 'Catawissa', the burdened vessel, are so glaring and grave and so clearly adequate in and of themselves, to account for the collision, that this court should not be assiduous to find fault on the part of the schooner. *The Socony No. 19* (C. C. A.), 29 F. (2d) 20; *The Lafayette, supra*; *The Chicago* (C. C. A.), 125 F. 712, 716; *The Transfer No. 8* (C. C. A.), 96 F. 253."

The complete lack of a lookout, ignoring the first signal of the "Barnes", and her utter indifference to the obligations of the Starboard Hand Rule in both failing to starboard her helm or promptly stop and reverse, are not matters of slight consequence. Each is a fault of great magnitude, in clear and complete violation of a distinct Rule of the Road at Sea. Each could separately account for the collision. For a vessel to navigate in a crowded harbor without a lookout, paying not the slightest attention to the signals of approaching vessels, giving none of her own and completely ignoring her duties and obligations when the approaching vessel's signals are finally heard, is little short of criminal negligence. To entitle such a vessel to a division of damages should require faults of equal consequence to be found on the part of the other.

LAST POINT.

The prayer of the petitioner should be granted.

Your petitioner respectfully submits that a final determination by this Court of the Rules of the Road involved in this case is of the utmost importance to the seamen of all nations.

The decision of the District Court, affirmed *per curiam* as it was by the Circuit Court of Appeals, is not only contrary to the statutes, as frequently and firmly interpreted by this Court, but contrary to their interpretation by other admiralty courts throughout the world.

Unless the errors of that decision be corrected by this Court, the effect will be to nullify a long line of contrary decisions by this Court and the admiralty courts of England, thus creating a regrettable confusion in the only body of International Law which has heretofore been clearly and firmly interpreted by maritime courts throughout the world, in strict adherence to the International Rules of the Road, to which all maritime nations were signatory.

Respectfully submitted,

WILBUR E. DOW, JR.,
Counsel for Petitioner.

APPENDIX.

Pertinent sections of the Inland Rules of the Road involved in the case at bar are herein set forth for the convenience of the Court. They are taken from 38 U. S. Code with the sections as indicated.

"§ 204. Steam vessels crossing. Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other. (June 7, 1897, c. 4, § 1, 30 Stat. 101.)"

"§ 206. Vessel having right of way to keep course. Art. 21. Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed. (June 7, 1897, c. 4, § 1, 30 Stat. 101.)"

"§ 207. Crossing ahead of vessel having right of way. Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other. (June 7, 1897, c. 4, § 1, 30 Stat. 101.)"

"§ 208. Duty of steam vessel to slacken speed. Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse. (June 7, 1897, c. 4, § 1, 30 Stat. 101.)"

"§ 221. Usual additional precautions required generally. Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. (June 7, 1897, c. 4, § 1, 30 Stat. 102.)"

(All of the above sections are identical with the International Rules.)

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

Nos. 1299-1300

SOUTHERN TRANSPORTATION COMPANY, as owner of the Barge "CUTLER",

Libellant-Appellee,

against

M/V "JULIUS H. BARNES", ERIE & ST. LAWRENCE CORPORATION,

Claimant-Appellant,

and

Tug "CALATCO No. 2" and CANAL LAKES TOWING CORPORATION,

Claimants-Respondents-Impleaded-Appellees.

ERIE & ST. LAWRENCE CORPORATION, Owner of the M/V "JULIUS H. BARNES",

Libellant-Appellant,

against

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Respondents-Appellees.

Brief for Canal Lakes Towing Corporation, Claimant of the Tug "Calatco No. 2" in Opposition to Petition for Writ of Certiorari

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CHRISTOPHER E. HECKMAN,
Attorney for Canal Lakes
Towing Corporation.

JAMES A. MARTIN,
CHRISTOPHER E. HECKMAN,
Counsel.

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Respondents-Appellees.

Brief for Canal Lakes Towing Corporation, Claimant of the Tug "Calatco No. 2" in Opposition to Petition for Writ of Certiorari

Canal Lakes Towing Corporation, claimant of the tug 'CALATCO No. 2" in both of the above-entitled actions, and ppellee in the proceedings in the Circuit Court of Appeals, respectfully submits that the petition for a writ of ertiorari should be denied for the following reasons:

1. The matter involves only the question whether the District Court and the Circuit Court of Appeals rightly held the petitioner's motor vessel "JULIUS H. BARNES" jointly at fault with the "CALATCO No. 2" on the ground that the "BARNES":

"(a) Continued to travel at a high rate of speed toward the tow (CALATCO No. 2) and barge, although the tug had not answered the first one-blast signal of the "BARNES";

(b) In that the "BARNES" blew no signal to inform the tug (CALATCO No. 2) that the "BARNES" did not understand the intention or course of the tug;

(c) In that the master of the "BARNES" when he realized that there was danger of collision, did not immediately reverse his engines and blow a danger signal;

(d) In that the speeding "BARNES" unnecessarily crowded the slow-moving tow in attempting to pass on the port side of the tug (CALATCO No. 2), although there was plenty of water in which the more maneuverable "BARNES" could have set her course to pass the tow at a greater distance off."

(The above quotation is taken from the Findings and Conclusions of the District Court, Record, fol. 965.)

2. The decision of the Circuit Court of Appeals is not in conflict with the decision of any Circuit Court of Appeals rendered subsequent to this Court's decision in *Postal Steamship Corporation* v. *El Isleo,* 308 U. S. 378, 60 S. Ct. 332, 84 L. Ed. 335 (Jan., 1940), wherein this Court delineated the duties of a privileged vessel in a crossing situation after danger of collision had become apparent, and remanded the case for further decision, or subsequent to the decision of the Circuit Court of Appeals for the Second Circuit in the same case (reported *sub nom Postal S.S. Corp.* v. *Southern Pac. Co.,* 112 F. (2nd)

297, June, 1940), wherein the Circuit Court following this Court's decision, held the privileged vessel jointly at fault with the burdened vessel for failing to stop when danger of collision was apparent. Neither the petition nor the supporting brief cites any case decided by a Circuit Court of Appeals subsequent to the *El Isleo* decisions, *supra*.

3. This Court said in the *El Isleo* (*supra*):

> "The so-called privileged vessel has no absolute right to keep her course and speed regardless of the danger involved in that action. Her right to maintain her privilege ends when there is danger of collision and in the presence of that danger both vessels must be 'stopped and backed if necessary, until signals for passing with safety are made and understood' " (387).

Thus it follows that the question petitioner now presents has been settled by this Court and the decisions sought to be reviewed are not in conflict with applicable decisions of this or other Courts and do not depart from the accepted and usual course of judicial proceedings.

4. That there is unanimity of thought among various Circuit Courts of Appeals since this Court's decision in the *El Isleo* (*supra*) is demonstrated by the fact that the Circuit Court of Appeals which decided the case included a Circuit Judge from each of the Fifth and Seventh Circuits.

5. The numerous references in petitioner's papers to the Rules of the Road at Sea established by International Convention are inappropriate. The vessels involved in this collision were navigating in Upper New York Bay, between Staten Island and the Battery of Manhattan, in inland waters. Their navigation, therefore, was governed by the inland rules of navigation and not by the Rules of the Road at Sea established by International Convention.

6. In its opinion, the District Court said (Record, fol. 942):

> "The obligation on the privileged vessel in a crossing situation to keep her course and speed does not apply when to do so 'is likely to result in disaster'. The 'Senator Rice' (C. C. A. 2nd Cir.), 223 Fed. 524. 'Over and underlying all the rules of navigation is that rule of common sense, so often referred to, that no one has the right to run into collision. That one vessel is obviously at fault does not justify another in running down her or her tow; a navigator may see how wrong another is, yet he must still avoid collision, if he reasonably can.' The 'George S. Tice' (C. C. A. 2nd Cir.) 287 Fed. 127. 'It must always be remembered that it is the risk of collision, not the collision itself, that masters must avoid.' Ocean S.S. Co. v. United States, 38 F. (2d) 782. The privileged vessel may not hold her course and speed after it becomes evident that the burdened vessel either cannot or will not keep out of the way. The 'Fulton,' 54 F. (2d) 467. This second circuit in Postal S.S. Corp. v. Southern Pac. Co., 112 F. (2d) 297, in referring to the privilege of the holding on vessel when faced with a cross-signal from the giving way vessel, stated: 'the interest of the holding-on vessel in holding her course and speed is nil; she is called upon to surrender nothing of substance, compared with the overshadowing interest of avoiding collision, or danger of collision,' and the court held that even though the other vessel was far more gravely at fault the court could not apportion damages—that the damages would be divided."

Affirming the decision, the Circuit Court of Appeals said in part (Record, fol. 1025):

> "We are unable to agree with libellant that the decision incorrectly adjudged the facts or is in conflict with any applicable legal principle. It will serve no useful purpose for us to do again what the district judge has already done so well, retell the story of the collision, trace and point out wherein its actors were at fault. It is sufficient for us to say that we

approve what the district judge did, and the way he did it, and that on his opinion and for the reasons that he gave, we affirm his decrees."

The decision of this Court in the *El Isleo* (*supra*) makes it clear that the decisions in this case are correct.

The petition should be denied.

Respectfully submitted,

CHRISTOPHER E. HECKMAN,
Attorney for Canal Lakes
Towing Corporation.

JAMES A. MARTIN,
CHRISTOPHER E. HECKMAN,
Counsel.